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FAILURE TO ASK DEFENDANT FOR ANY LEGAL CAUSE WHY JUDGMENT SHOULD NOT BE PRONOUNCED.

The New York Court of Appeals held recently, in the case of *The People v. Beecher Faber, New York Law Journal,* Vol. XLIV, No. 9, that the failure of the records to show that the clerk had asked the defendant, in a murder trial, whether he had any legal cause to show why judgment should not be pronounced against him, was a serious error at common law, and is now made so by section 480 of the *Code of Criminal Procedure* of that State.

The custom of making this inquiry seems to have originated in our early common law in trials for high treason, where the defendant was never allowed counsel, but the court was considered the guardian of the interest of the accused. Among the earlier reported cases on the subject are those of *Rex v. Geary,* 2 Salk., 630, and *King v. Speke,* 3 Salk., 358. In each of these cases, the defendant was attainted of high treason, and confessed the same. Upon a writ of error brought to reverse the judgment, the exception taken was, that it did not appear that the accused was asked what he had to say why judgment should not be given against

him; and the court held the exception well taken, for he might have matter to move in arrest of judgment, or a pardon; and the attainder was reversed. This custom was later extended in England to all trials of felonies, and, it may be conceded, formed a part of the common law of that country. 1 *Chitty's Crim. Law.*, 700.

The courts in this country are, by no means, in harmony on this subject. The diversity of opinion among our courts is attributable to the fact that some of the courts have tried to apply strictly, in this country, an established rule of the common law of England which, by our methods of procedure, and the safeguards of our law for human life, have been rendered unimportant.

In *Messner v. The People,* 45 N. Y., 1, the court cited, with approval, the early English cases of *Rex v. Geary, supra,* and *King v. Speke, supra,* and gave the same reasons for holding that the omission of the *allocutus* was error: "The court never gave the prisoner the opportunity of showing cause why the verdict should not be set aside or the judgment thereon arrested. It was not, therefore, legally proper to proceed to judgment. For aught that appears the prisoner may have a legal reason to show why judgment should not pass against him."

There are many decisions in this country which support the principal case, including decisions of the United States Supreme Court. *Croker v. State,* 47 Ala., 53; *Dougherty v. Commonwealth,* 69 Pa. St., 286; *Ball v. United States,* 140 U. S., 118; *Messner v. The People, supra.* In *Ball v. United States, supra,* the court said: "The forms of records are deeply seated in the foundations of the law; and as they conduce to safety and certainty, they surely ought not to be disregarded when the life of a human being is in question."

But there are not wanting eminent authorities holding that a total omission of the *allocutus* on the record does not constitute error. *State v. Hoyt,* 47 Conn., 518; *State v. Bell,* 27 Mo., 324; *Jeffries v. Commonwealth,* 12 Allen (Mass.), 145; *Gannon v. The People,* 127 Ill., 507.

In stopping to consider the reasons given, under the common law of England, for holding an omission of the *allocutus* on the

record to be error, it is hard to understand why, under our methods of procedure, such omission should be considered fatal. In this country, the accused is always allowed counsel, who is familiar with the proceedings of the trial, and who knows that the verdict is not conclusive on the prisoner. They know all the remedies that may be had after verdict and how they may be instituted. Under our system, the motion in arrest and the motion for a new trial are disposed of before the time for the sentence arrives. "Sentence is not pronounced until the party has had ample opportunity to move for a new trial for any proper cause, and to file his exceptions to the rulings in the matters of law, or a motion in arrest of judgment." *Jeffries v. Commonwealth, supra.*

In the case of *Hoyt v. State, supra,* the court clearly pointed out that the *allocutus* is a mere form, and no harm could possibly come from its omission. The court said: "Under our practice what possible harm can be occasioned to the prisoner by such omission on the part of the court? He can have no pardon to plead, for that can only come from the legislature after sentence, no attainder to save, no benefit of clergy to pray for."

"If he should say anything suggesting ground for some relief, his saying it would not be the remedy; it would have to take on some legal form and be filed within the time prescribed. If he should, in a capital case, urge mitigating circumstances, and put himself on the mercy of the court, it would avail nothing, because the court would have no discretion to exercise in regard to the punishment."

So we have in this country these two lines of decisions: one holding that the *allocutus* is a form of record, firmly established in our law, and should not be disregarded, because it is conducive to safety and certainty; the other holding that the *allocutus,* by reason of our court procedure, has become a mere form, an idle ceremony, which may be omitted without prejudicing the interest of the accused.

But in those states where the omission of the *allocutus* is considered a serious error, what effect has such an omission on the proceedings? Is such an omission a ground for a new trial, or should it be remanded with instructions to proceed from verdict? In the principal case the court refrained from deciding this point, saying that it was not necessary, under the circumstances of the

case. Some courts hold that such an omission is ground for a new trial. *Messner v. The People, supra;* while others hold that such an omission is not a ground for a new trial, but the verdict must stand, the case to go back to the *nisi prius* court for the purpose of making the inquiry referred to, and then to pronounce sentence. In *State v. Hoyt, supra,* the court said: "Upon principle it can be no ground for a new trial. There was no mis-trial. The error (if any) did not enter into or in any manner affect the verdict: so that the verdict must stand; and if judgment should be arrested or set aside, the case should go back to the Superior Court to be proceeded with from the point where the error intervened, that is, the court would be called upon to make the inquiry referred to, and then pronounce sentence again." It seems that the preponderance of authority is in accord with the above case. *State v. Johnson,* 67 N. C., 59; *Keech v. The State,* 15 Fla., 591; *Kinsler v. Wyoming Territory,* 1 Wy. Ter., 112.

IS THE SAME DEGREE OF CARE REQUIRED OF THE OWNER OF A PASSENGER ELEVATOR AS IS REQUIRED OF A COMMON CARRIER?

It seems that the modern inclination of courts is to hold owners of passenger elevators to the same degree of care as common carriers, and yet there are a few holding, with what seems to be sound reasoning, to the contrary. At least, there is sufficient diversity of opinion on the subject to make the topic of practical interest.

In discussing this question, it would be well to bear in mind the status and relation of common carriers and passenger elevators to the public. The chief difference between the two is this: there does not exist any prior or antecedent relation between the common carrier and passenger; but, in the case of passenger elevators, there does exist an antecedent relation. A common carrier holds itself out to carry all who may rightfully apply for carriage; but a passenger elevator only holds itself out to carry those who are tenants of the building, or guests of the hotel, who have, in reality, purchased the elevator privilege. As there exists this difference in these two carriers why should not there exist a difference as to their liability to their passengers?

The case of *Quimby v. Bee Building Co.,* 127 N. W. (Neb.), 118, recently presented itself in the Supreme Court of Nebraska,